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Supreme Court, U.S.
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No. 95-203

In The

Supreme Court of the United States

October Term, 1995

CITY OF MEMPHIS; DR. W.W. HERENTON, Mayor; MELVIN BURGESS, Director of Police Services,

Petitioners,

vs.

EAST BROOKS BOOKS, INC., d/b/a Getwell Bookmart and Airport Adult Theater, STEVE COOPER, SOUTHERN ENTERTAINMENT MANAGEMENT COMPANY, INC., d/b/a Club Tiffany,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF

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7 pp

Respondents' Brief in Opposition to Certiorari contains numerous irrelevancies and errors of law, which we correct below.

1. Respondents' recitation of the judicial review times involved in the various cases is unresponsive and is a false distinction. Resp. Br. 8-14. The issue here is the sufficiency of referring a disappointed permit applicant or holder to the state courts and state court procedures for adjudication, or the wholesale intrastate political and judicial restructurings that the Sixth Circuit opinion effectively requires for local regulation of First Amendment activities.

2. Respondents' arguments regarding denial of a new applicant are irrelevant. Resp. Br. 6, 17, 19. The Sixth Circuit affirmed that no interim permit is required for rejected applicants. *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 225 (6th Cir. 1995), Pet. App. B, page 10a. Respondents have not sought certiorari from that ruling. In any event Respondents, who own existing adult businesses, lack standing to raise the issue.

3. Respondents cite the incorrect statutes for common-law certiorari. Resp. Br. 1, 5, 6, 15, 16, 17. Your Petitioners will again correct Respondents in that Tennessee Code Annotated § 27-8-101, *et seq.*, "Certiorari and Supersedeas," applies when obtaining certiorari from the decision of an "officer." Tenn. Code Anno. § 27-8-101. The cited Chapter 9, T.C.A. §§ 27-9-101, *et seq.*, is entitled "Review of Boards and Commissions," and applies to appeals from such bodies.

The Memphis permit decision is made by an *officer, i.e.*, the Director of Police Services. Ord. § 20-122(b)(1), Pet. App. D, 66a. Under the correct Chapter 8, "[t]he writ of certiorari may be granted *whenever authorized by law, and* also *in all cases* where an inferior tribunal, board, or officer exercising judicial functions

has exceeded the jurisdiction conferred, or is acting illegally,. . ." when, in the judgment of the court, there is no other plain, speedy, or adequate remedy. Tenn. Code Anno. § 27-8-101 (emphasis added). Here, the writ is both specifically authorized by the Ordinance and would be generally available even if it were not. Ord. § 20-124(6), Pet. App. D, 74a. *Accord Graff v. City of Chicago,* 9 F.3d 1309, 1325 (7th Cir. 1993), cited at Pet. p. 8 (referring denied permit-holder to general state court procedure satisfies prompt judicial review requirement). Further, the correct chapter provides that supersedeas, or stay, "*shall*" issue in all necessary cases, and "*shall* effectively supersede all further proceedings . . . ." Tenn. Code Anno. § 27-8-112 (emphasis added), App. F hereto. The rule is ancient that supersedeas "ought *always* to be used on a proper case shown, to prevent mischief." *Kearney v. Jackson,* 9 Tenn. 294 (1830) (emphasis added).

4. Respondents belie their own argument on the supposed insufficiency of the Tennessee common-law writ of certiorari by describing the apparently identical Illinois writ as "extremely broad in scope and [extending] to all questions of fact and law contained in the record before the Court." Resp. Br. 10. Review by Tennessee common-law writ of certiorari "requires a searching and careful inquiry and subjects the agency's decision to close scrutiny." *Nat'l Council on Compens. Ins. v. Gaddis,* 786 S.W. 2d 240, 242 (Tenn. App. 1988), *perm. app. denied,* (1990). The reviewing court examines not only the legality of the administrative proceeding, but, as the District Court noted, "the conclusions of law, or mixed fact and law, reached by the administrative body below." *See* District Court Order, Pet. App. C 32a, *citing Pack v. Royal-Globe Ins. Co.,* 457 S.W.2d 19, 22 (Tenn. 1970), *Boyce v. Williams,* 215 S.W. 2d 272 (Tenn. 1965). The District Court noted that "'[a]cting illegally' . . . encompasses findings of fact for which there is no legally sufficient basis and therefore, under the writ, the reviewing court

must review the facts considered and record established by the administrative body." *Id.*, Pet. App. C, 32a. (The Sixth Circuit did not address Respondents' arguments on the sufficiency of the writ *per se*.)

5. There is no distinction between the Tennessee common-law writs of certiorari described at Tenn. Code Anno. §§ 27-8-101, *et seq.*, and certiorari as provided in the Tennessee Uniform Administrative Procedures Act, Tenn. Code Anno. § 4-5-322, *see especially,* 322(f) and (h), except for any minor procedural differences called for in the Admin. Proc. Act § 4-5-322(f). *Cf.* Resp. Br. 17, 19. Both the Tennessee Digest ("Certiorari") and the literature treat such writs together and make no distinction. *See, e.g.,* 2 *Tennessee Jurisprudence,* Appeal & Error § 8 "Certiorari." Also, the writ described in *Tennessee Central R. Co. v. Campbell,* 75 S.W. 1012 (Tenn. 1912) as "one of the most valuable and efficient" remedies provided, although no longer used for interlocutory appeals, is the identical common-law writ now called for in the Ordinance. *See Hewgley v. Trice,* 207 Tenn. 466, 340 S.W. 2d 918, 921 (1960), *reh. denied; McGee v. State,* 207 Tenn. 431, 340 S.W. 2d 904 (1960); *Roberts v. Brown,* 43 Tenn. App. 567, 310 S.W. 2d 197 (1957); *cf.* Resp. Br. 2, 18.

6. "Although a municipal corporation has no inherent licensing power, that power is delegated to municipal corporations by the state." McQuillen, *Municipal Corporations* § 26.22.05. *Cf.* Resp. Br. 18. Additionally, Memphis is a home-rule city, and such authority is derived through its charter. The preamble to this Ordinance notes the City Charter authority to enact appropriate police and other legislation ensuring the public health, safety, and welfare. Pet. App. D, 52a. (Respondents did not raise this issue until their response to petition to rehear, at the Sixth Circuit.)

7. Respondents continue to rely upon obscenity cases and statutes. Resp. Br. 19. Such cases are irrelevant for the reasons given at Petition pp. 12-13.

8. *Redner v. Dean.* Contrary to Respondents' assertion, Resp. Br. 11, your Petitioners cite and quote *Redner v. Dean*, 29 F.3d 1495 (11th Cir. 1994), at Petition pp. 9, 10, and 11.

9. The availability of expeditious judicial review obviates the need for a stay, as Respondents correctly state. Resp. Br. 12. *National Socialist Party v. Village of Skokie*, 432 U.S. 43, 44, 97 S. Ct. 2205 (1977). One is an alternative to the other. *Id.* The Memphis Ordinance provides for both. Ord. §§ 20-124(6), (7), Pet. App. D, 74a-75a.

10. Both Professor Gerard's quote and Petitioners cite case law supporting the argument that the Sixth Circuit opinion effectively grants greater rights to adult business owners than others enjoying supposedly greater First Amendment protection. Pet. 16-17; *cf.* Resp. Br. 22. The case cited upholds a federal statute requiring corporately-owned newspapers and periodicals using the mails annually to furnish *and to publish* "the identity of the corporation and stockholders thereof," and other information such as identification of mortgagees — the only federal statute known to Petitioners that mandates the content of publication, and this for *fully-protected* speech. *Lewis Publication Co. v. Morgan*, 229 U.S. 288 (1913), upholding 39 U.S.C. § 3865. Yet the Sixth Circuit opinion holds unconstitutional the mere *furnishing* of names of stockholders in corporations that engage in only marginally-protected speech, where the purpose of such disclosure is to check the secondary criminal and other activity that this Court has recognized such businesses engender.

11. The preliminary injunction in this case was by consent. *See* Resp. Br. 2.

12. Petitioners refer the Court to our Petition in all further reply to the Brief in Opposition.

CONCLUSION

For these reasons, and those provided in the Petition, the Court should grant a writ of certiorari.

Respectfully submitted,

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APPENDIX F — RELEVANT STATUTES

Title 27, Chapter 8, "Certiorari and Supersedeas"

Tenn. Code Anno. § 27-8-101. Constitutional basis. The writ of certiorari may be granted whenever authorized by law, and also in all cases where an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction conferred, or is acting illegally, when, in the judgment of the court, there is no other plain, speedy, or adequate remedy.

Tenn. Code Anno. § 27-8-112. Supersedeas. The clerk shall also issue a writ of supersedeas in all necessary cases, directed to the opposite party, or the officer in whose hands the execution may be, which shall effectually supersede all further proceedings thereon.